

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DR. MAGDY FOUAD, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

ISILON SYSTEMS, INC., et al.,

Defendants.

No. C07-1764 MJP

**LEAD PLAINTIFF'S MEMORANDUM
OF LAW IN SUPPORT OF
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT**

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**LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT**

Lead Plaintiff Dr. Magdy Fouad ("Lead Plaintiff") respectfully submits this Memorandum of Law in support of his unopposed motion for the entry of an order (i) granting preliminary approval to the proposed settlement set forth in the Stipulation of Settlement dated October 23, 2009 (the "Stipulation"); (ii) approving the form and manner of giving notice of the proposed Settlement to the Class¹; (iii) certifying the proposed Class for purposes of settlement; and (iv) setting a hearing date for final approval of the Settlement and its terms, including the proposed Plan of Allocation (the "Settlement Hearing").²

I. INTRODUCTION

The proposed Settlement now submitted to the Court for preliminary approval provides for the payment of Fifteen Million Dollars (\$15,000,000) in cash (the "Settlement Fund") for the benefit of the Class. As discussed in detail below, Lead Plaintiff and its counsel ("Lead

¹ The Class is defined as all persons or entities who purchased or otherwise acquired Isilon Systems, Inc. common stock between December 14, 2006 and November 8, 2007, inclusive, including all persons or entities who acquired shares of Isilon common stock pursuant and/or traceable to Isilon's December 2006 initial public offering, and who were damaged thereby. Excluded from the Class are the Defendants; any officers or directors of Isilon during or after the Class Period; any corporation, trust or other entity in which any Defendant has a controlling interest; the members of the immediate families of Barry J. Fidelman, Elliott H. Jurgensen, Jr., Gregory L. McAdoo, Matthew S. McIlwain, Sujal M. Patel, James G. Richardson, William D. Ruckelshaus, Stuart W. Fuhlendorf or Steven S. Goldman (the "Individual Defendants") or their successors, heirs, assigns and legal representatives; and venture capital firms Madrona Venture Group, Atlas Venture, Atlas Venture Fund V LP, Atlas Venture Entrepreneurs Fund V LP, Atlas Venture Associates V LP, Sequoia Capital, Sequoia Capital X, Sequoia Technology Partners X LP, Sequoia Capital X Principals Fund LLC, and SC X Management LLC, and any of their principals. Also excluded from the Class are any putative Class Members who exclude themselves by filing a request for exclusion in accordance with the requirements set forth in the Notice and pursuant to the Court's order.

² Unless otherwise noted, all capitalized terms are defined in the Stipulation.

Counsel”) submit that the proposed Settlement is in the best interests of the Class and represents a significant recovery, particularly in light of the risks of litigation. Accordingly, Lead Plaintiff respectfully moves for preliminary approval and submits this Memorandum of Law in support of the proposed Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description of the Action

On and after November 1, 2007, the following three class actions were filed against Defendants in the United States District Court for the Western District of Washington alleging violations of the federal securities laws: *Marcel Youakim v. Isilon Systems, Inc., et al.*, Civil Action No. 07-1764; *Kirby D. Denger and David W. Hooper v. Isilon Systems, Inc., et al.*, Civil Action No. 07-1992; and *Phenil Patadia v. Isilon System, Inc., et al.*, Civil Action No. 07-2011.

By Order dated February 4, 2008, the Court consolidated these actions into Civil Action No. 07-1764, under the caption *Dr. Magdy Fouad, individually and on behalf of all others similarly situated v. Isilon Systems, Inc., et al.* (the “Action”). In this same Order, Judge Pechman appointed Dr. Magdy Fouad as Lead Plaintiff and appointed Cohen Milstein Sellers & Toll PLLC (“Cohen Milstein”) as lead counsel (“Lead Counsel”) and Keller Rohrbach L.L.P. as liaison counsel (“Liaison Counsel”) for the Class. The Southwest Carpenters Pension Trust is an additional plaintiff in the case, represented by Bernstein Litowitz Berger & Grossmann LLP.

On April 18, 2008, after extensive research and investigation, Plaintiffs filed the Consolidated Class Action Complaint (the “Complaint”) asserting claims under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder by the United States Securities and Exchange Commission (the “SEC”), and under §§ 11, 12 and 15 of the Securities Act of 1933, 15 U.S.C.

§§ 77k, 77l, and 77o, against Isilon, Barry J. Fidelman, Elliott H. Jurgensen, Jr., Gregory L. McAdoo, Matthew S. McIlwain, Sujal M. Patel, James G. Richardson, William D. Ruckelshaus, Stuart W. Fuhlendorf, Steven S. Goldman, Morgan Stanley & Co., Incorporated, Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Needham & Company, LLC, RBC Capital Markets Corp., Madrona Venture Group, Atlas Venture, Atlas Venture Fund V LP, Atlas Venture Entrepreneurs Fund V LP, Atlas Venture Associates V LP, Sequoia Capital, Sequoia Capital X, Sequoia Technology Partners X LP, Sequoia Capital X Principals Fund LLC, and SC X Management LLC (the “Original Defendants”). The Complaint alleged that these Defendants disseminated (or controlled those who disseminated) materially false and misleading statements and failed to disclose material facts regarding Isilon’s revenue recognition practices.

On June 16, 2008, the Original Defendants filed motions to dismiss the Complaint. Among other things, the Original Defendants strenuously argued that Plaintiffs could not establish scienter required for the Exchange Act claims and that there was no loss causation. Plaintiffs filed a memorandum in opposition to these motions on July 31, 2008, and the Original Defendants filed their reply memoranda on September 11, 2008. On December 16, 2008, the Court held a hearing on the Original Defendants’ motions to dismiss. By Order dated December 29, 2008, Judge Pechman (i) granted the motions to dismiss the Complaint filed by Madrona Venture Group, Atlas Venture, Atlas Venture Fund V LP, Atlas Venture Entrepreneurs Fund V LP, Atlas Venture Associates V LP, Sequoia Capital, Sequoia Capital X, Sequoia Technology Partners X LP, Sequoia Capital X Principals Fund LLC, and SC X Management LLC; (ii) denied the motion to dismiss filed by Morgan Stanley & Co., Incorporated, Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Needham & Company, LLC and RBC Capital Markets Corp.; and (iii) granted in part and denied in part the motions to dismiss filed by Isilon, Barry J.

1 Fidelman, Elliott H. Jurgensen, Jr., Gregory L. McAdoo, Matthew S. McIlwain, Sujal M. Patel,
 2 James G. Richardson, William D. Ruckelshaus, Stuart W. Fuhlendorf and Steven S. Goldman.

3 On July 14 and September 11, 2009, the Parties participated in a mediation presided over
 4 by Mr. David Geronemus of JAMS. As a result of this mediation, the Parties reached a
 5 memorandum of understanding for the resolution of this Action. Today, October 23, the Parties
 6 have executed the Stipulation of Settlement, filed herewith.
 7

8 **B. Reasons for the Settlement**

9 Lead Plaintiff, by and through Lead Counsel, engaged in hard-fought litigation, discovery
 10 work, and then substantial arm's-length negotiations with counsel for Defendants. This not only
 11 included the formal two-day mediation session presided over by an experienced mediator, but
 12 also many informal discussions and a meeting with Counsel for Defendants before the mediation.
 13 All of this work ultimately led to the Settlement now proposed. Lead Plaintiff has conducted a
 14 thorough investigation of Plaintiffs' allegations, which included extensive interviews with key
 15 witnesses and review of public documents, review of more than 100,000 pages of documents
 16 Isilon produced to the SEC as part of the SEC's investigation of Isilon, and work with an expert
 17 to arrive at a detailed damages analysis. Therefore, Lead Plaintiff has entered into this
 18 Settlement with an in-depth understanding of the strengths and weaknesses of Plaintiffs' claims
 19 and the damages allegedly suffered by the Class, as well as the details and viability of the
 20 defenses put forward by the Defendants. The Settlement represents a substantial all-cash fund for
 21 the Class and will eliminate the significant risk that continued litigation might result in a smaller
 22 recovery or possibly no recovery at all.
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1 Although Defendants have denied and continue to deny each and all of the claims and
 2 contentions alleged by Plaintiffs, they have agreed to the Settlement for the reasons set forth in
 3 the Stipulation.

4 Based upon the foregoing, Lead Plaintiff and Lead Counsel submit that the Settlement is
 5 fair, adequate and reasonable and that it warrants preliminary approval by the Court.
 6

7 **III. ARGUMENT**

8 **A. The Settlement Meets All the Criteria Necessary for this Court to Grant Preliminary Approval**

9 According to the *Manual for Complex Litigation*, the process for approving a class action
 10 settlement
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12 involves a two-step process. First, counsel submit the proposed terms of the
 13 settlement and the court makes a preliminary fairness evaluation. . . . If the
 14 preliminary evaluation of the proposed settlement does not disclose grounds to
 15 doubt its fairness or other obvious deficiencies . . . the court should direct that
 16 notice under Rule 23(e) be given to the class members of a formal fairness
 17 hearing, at which arguments and evidence may be presented in support of and in
 18 opposition to the settlement.

19 § 30.41, at 236-37 (3d ed. 1995).

20 By this motion, Lead Plaintiff requests that the Court take the first step in the process,
 21 and preliminarily approve the proposed Settlement and allow Notice of it and a final approval
 22 hearing to be sent to Class Members. Lead Plaintiff asks the Court to enter the proposed Order
 23 for Notice and Hearing ("Notice Order"), attached as Exhibit A to the Settlement Stipulation
 24 separately submitted herewith.

25 Under Rule 23(e) of the Federal Rules of Civil Procedure, before a class action may be
 26 dismissed or compromised, notice of the proposed dismissal or compromise must be given in the
 manner directed by the court, and judicial approval must be obtained. The issue of whether a

1 proposed settlement should be approved is within the sound discretion of the district court, which
2 should be exercised in the context of public policy strongly favoring the pretrial settlement of
3 class action lawsuits. *See Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992);
4 *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

5 Preliminary approval does not require the Court to make a final determination that a
6 settlement is fair, reasonable and adequate. Rather, that decision is made only at the final
7 approval stage, after notice of the settlement has been given to class members. *See* 5 James Wm.
8 Moore, *Moore's Federal Practice* ¶ 23.83[1], at 23-336.2 to 23-339 (3d ed. 2001). In
9 considering a potential settlement, the Court need not reach any ultimate conclusions on the
10 issues of fact and law that underlie the merits of the dispute, *Detroit v. Grinnell Corp.*, 495 F.2d
11 448, 456 (2d Cir. 1974), and need not engage in a trial on the merits. *Officers for Justice*, 688
12 F.2d at 625. Preliminary approval of a settlement should be granted if the proposed settlement
13 falls within the range of what could be found "fair, adequate and reasonable" so that notice may
14 be given to the proposed class and a hearing for final approval can be scheduled. *Id.*; *Class*
15 *Plaintiffs*, 955 F.2d at 1276.

16 As outlined in the proposed Notice Order, if preliminary approval is granted, Lead
17 Plaintiff will notify Class Members of the Settlement by mailing the Notice and Proof of Claim
18 to them. The Notice advises Class Members of the essential terms of the Settlement, of
19 information regarding Lead Counsel's fee and expense application, and of the proposed plan for
20 allocating the Settlement proceeds among Class Members. It also sets forth the procedure for
21 objecting to the Settlement or opting out of the Class, and notifies Class Members of the date,
22 time and place of the Settlement Hearing. The proposed Notice plan also requires that Lead
23 Plaintiff publish the Summary Notice.

As summarized below, preliminary approval of the Settlement should be granted because it is well within the range of possible approval.

B. The Settlement Agreement Resulted from Arm's-Length Negotiations

There is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. This Settlement is the result of arm's-length negotiations by experienced counsel and was reached only after Plaintiffs' Counsel diligently prosecuted the claims of the Class. Based upon Plaintiffs' Counsel's familiarity with the factual and legal issues of this Action, the investigation they performed and discovery work they completed, and their work preparing for and participating in the mediation, and urging their positions on the mediator and Defense Counsel, they were ultimately able to negotiate a very good result for the Class. This result also takes into account the defenses of Defendants, and the risks that the Action might not survive a motion for summary judgment or that Lead Plaintiff would not prevail at trial or upon appeal. Indeed, throughout this litigation, Defendants asserted that loss causation could not be established in this case.

Courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *See, e.g., In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL Docket No. 901, 1992 U.S. Dist. LEXIS 14337, *8 (C.D. Cal. June 10, 1992) (finding belief of counsel that the proposed settlement represented the most beneficial result for the class to be a compelling factor in approving settlement).³ Here, Lead Counsel (and all of

³ *See also Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988); *Reed v. GMC*, 703 F.2d 170, 175 (5th Cir. 1983); *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982); *Armstrong v. Board of School Directors*, 616 F.2d 305, 325 (7th Cir. 1980); *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 489 (E.D. Pa. 1985).

1 Plaintiffs' Counsel) have extensive experience in securities litigation, and believe that this
 2 Settlement is fair, reasonable and adequate in light of the circumstances of this Action.

3 The question of whether a proposed settlement is fair, reasonable and adequate
 4 necessarily requires a judgment and evaluation by the attorneys for the parties based upon a
 5 comparison of "the terms of the compromise with the likely rewards of litigation."
 6 *Weinberger*, 698 F.2d at 73 (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer*
 7 *Ferry v. Anderson, Inc.*, 390 U.S. 414, 424-25 (1968)). An evaluation of the costs and benefits
 8 of settlement must also be tempered by a recognition that any compromise involves concessions
 9 on the part of all of the settling parties. Indeed, "the very essence of a settlement is compromise,
 10 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at
 11 624 (citation omitted). Here, \$15,000,000 has been obtained for the Class, early in the litigation,
 12 and the Settlement allows the Class Members to receive benefits now and completely avoid the
 13 delay that would come from continued litigation. In addition, there is no certainty, given
 14 Defendants' plans to assert various defenses, that Lead Plaintiff would prevail at trial (after the
 15 extended motion practice that would be expected to litigate motions for summary judgment).
 16 The proposed Settlement eliminates these and many other risks of continued litigation.

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 18
 19 **C. The Stage of the Proceedings and Discovery Support Approval of The Settlement**

20 "[T]he stage of the proceedings" is another factor considered by courts when
 21 determining the fairness of a settlement. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)
 22 (citation omitted). Here, Lead Counsel conducted a thorough investigation of the facts and
 23 circumstances, having interviewed at least a dozen witnesses and reviewed over 100,000 pages
 24 of material produced to the SEC as part of its investigation of Isilon, prior to the execution of the
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1 Stipulation. There can be no question that at the time the Settlement was reached, Lead Counsel
 2 had a clear view of the strengths and weaknesses of the Class's claims.

3 Thus, the proposed Settlement is the product of serious, informed, non-collusive
 4 negotiations, and well within the range of possible approval and does not have any obvious
 5 deficiencies. Therefore, preliminary consideration of the applicable factors for granting final
 6 approval of class action settlements lends support to Lead Plaintiff's belief that this Settlement is
 7 well "within the range of possible approval." *Armstrong v. Board of School Directors*, 616 F.2d
 8 305, 310 (7th Cir. 1980).
 9

10 **D. The Settlement Confers a Substantial Benefit**

11 Under the terms of the Settlement, Defendants have agreed to create a fund consisting of
 12 \$15 million in cash to be allocated among Class Members after deduction for Court-approved
 13 fees and expenses. This is a significant recovery, particularly in light of the risks of continued
 14 litigation. If the litigation had continued, Lead Plaintiff faced substantial risks, including
 15 establishing Defendants' liability and the Class's full amount of damages at summary judgment
 16 or trial. Further, continued litigation would result in significant expense and risk. This recovery,
 17 obtained in the face of the real risk of no recovery at all, particularly supports approval of the
 18 Settlement.
 19

20 **E. Submission of the Settlement to the Class Is Appropriate**

21 Rule 23 requires that notice of a settlement be "the best notice practicable under the
 22 circumstances, including individual notice to all members who can be identified through
 23 reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). *See also* Alba Conte & Herbert Newberg,
 24 NEWBERG ON CLASS ACTIONS, §8.2 at 162-65 (4th ed. 2002). In addition, the PSLRA imposes
 25 its own requirements for notice: it must state: (i) the amount of the settlement proposed to be
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1 distributed to the parties to the action, determined in the aggregate and on an average per-share
 2 basis; (ii) if the parties do not agree on the average amount of damages per share that would be
 3 recoverable in the event Lead Plaintiff prevailed, a statement from each settling party concerning
 4 the issue(s) on which the parties disagree; (iii) a statement indicating which parties or counsel
 5 intend to make an application for an award of attorneys' fees and costs (including the amount of
 6 such fees and costs determined on an average per-share basis), and a brief explanation supporting
 7 the fees and costs sought; (iv) the name, telephone number, and address of one or more
 8 representatives of counsel for the plaintiff class who will be reasonably available to answer
 9 questions concerning any matter contained in the notice of settlement published or otherwise
 10 disseminated to the class; (v) a brief statement explaining the reasons why the parties are
 11 proposing the settlement; and (vi) such other information as may be required by the Court. *See*
 12 15 U.S.C.A. §78u-4(a)(7)(A)-(F).
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15 As detailed in the proposed Notice Order, Lead Counsel and the Claims Administrator
 16 propose to mail copies of the Notice of Proposed Settlement of Class Action, Motion for
 17 Attorneys' Fees and Reimbursement of Expenses and Settlement Fairness Hearing (the "Notice")
 18 and the Proof of Claim and Release (which together meet each of the requirements described in
 19 the above paragraph) by first class mail to all persons and entities who appear on the transfer
 20 records of Isilon during the Class Period. In addition, Lead Counsel intends to publish a
 21 summary notice once in *The Investor's Business Daily* and provide a link to the Notice and the
 22 Proof of Claim and Release form on the Settlement Administrator's website. Lead Counsel also
 23 intends to mail copies of the Notice to the largest banks and brokerage houses requesting that the
 24 Notice be sent to all persons and entities for whom they acted as nominee purchaser of Isilon
 25 common stock. The proposed notice program fulfills the requirements of due process because the
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1 proposed Notice alerts and informs those members of the Class who can be identified through
2 reasonable efforts of all of the information set forth above.

3 **F. The Class Should be Certified for Settlement Purposes**

4 The preliminary approval process is also utilized to certify a settlement class when a class
5 has not previously been certified by the court. The Ninth Circuit has long recognized that class
6 actions may be certified for the purpose of settlement only. *Hanlon v. Chrysler Corp.*, 150 F.3d
7 1011, 1019 (9th Cir. 1998). Classes for the purposes of settlement are recognized under the
8 general scheme of Rule 23, provided that the class is eventually determined to meet the
9 certification requirements under Rule 23. *Id.* Rule 23(a) sets forth four prerequisites to class
10 certification: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of
11 representation. In addition, the class must meet one of the three requirements of Rule 23(b). *See*
12 *Fed. R. Civ. P. 23*; *see also Manual for Complex Litigation*, § 21.633 (4th ed. 2004). Here, the
13 proposed Class is defined in the Stipulation as: “all persons or entities who purchased or
14 otherwise acquired Isilon common stock between December 14, 2006 and November 8, 2007,
15 inclusive, including all persons or entities who acquired shares of Isilon common stock pursuant
16 and/or traceable to Isilon’s December 2006 initial public offering, and who were damaged
17 thereby.” Stipulation, at ¶1(c).

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20 Generally, courts have found securities claims to be particularly well-suited for class
21 action status because they allow for the policies behind the securities laws to be enforced in
22 circumstances where there are numerous investors with small individual claims that otherwise
23 would effectively be barred from litigation. *See Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir.
24 1975). This Action is no exception and, as explained below, the Class satisfies each of the
25 requirements set forth above.
26

1 **1. Numerosity**

2 Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is
 3 impracticable. The Ninth Circuit has stated that “‘impracticability’ does not mean
 4 ‘impossibility,’ but only the difficulty or inconvenience of joining all members of the class.”
 5 *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation
 6 omitted). Indeed, classes consisting of 25 members have been held to be large enough to justify
 7 certification. *See Perez-Funez v. Dist. Dir., Immigration & Naturalization Serv.*, 611 F. Supp.
 8 990, 995 (C.D. Cal. 1984); *see also In re Cirrus Logic Sec.*, 155 F.R.D. 654, 656 (N.D. Cal.
 9 1994). Additionally, the exact size of the class need not be known so long as general knowledge
 10 and common sense indicate that the class is large. *See Cirrus Logic*, 155 F.R.D. at 656; *see also*
 11 *Schwartz v. Harp*, 108 F.R.D. 279, 281-282 (C.D. Cal. 1985) (“A failure to state the exact
 12 number in the proposed class does not defeat class certification, and plaintiff’s allegations plainly
 13 suffice to meet the numerosity requirement of Rule 23.”) (citations omitted).

14 Here, millions of shares of Isilon common stock were traded during the Class Period. In
 15 addition, beneficial holders of Isilon common stock are believed to number in the thousands and
 16 are geographically located throughout the United States, making joinder of all Class Members
 17 impractical. Thus, the numerosity element is satisfied.

18 **2. Commonality**

19 Rule 23(a)(2) is satisfied where the proposed class representatives share at least one
 20 question of fact or law with the claims of the prospective class. *Wehner v. Syntex Corp.*, 117
 21 F.R.D. 641, 644 (N.D. Cal. 1987). Further, there may be varying fact situations among
 22 individual members of the class as long as the claims of the plaintiff and other class members are
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1 based on the same legal or remedial theory. *Blackie*, 524 F.2d at 902. Here, questions that are
 2 common to the proposed Class include, among others:

- 3 (i) whether the federal securities laws were violated by Defendants' alleged
 4 acts;
- 5 (ii) whether the Company's publicly disseminated releases and statements
 6 during the Class Period omitted and/or misrepresented material facts;
- 7 (iii) whether the market prices of Isilon common stock during the Class Period
 8 were artificially inflated due to the material nondisclosures and/or
 misrepresentations complained of herein; and
- 9 (iv) whether members of the Class have sustained damages and, if so, what is
 the appropriate measure of damages.

10 Securities actions containing common questions such as the ones listed above have repeatedly
 11 been held to be prime candidates for class certification. In short, because the core complaint of
 12 all Class Members is that they purchased and/or acquired Isilon common stock at artificially
 13 inflated prices, and suffered damages as a result of the alleged securities violations, the
 14 commonality requirement of Rule 23(a)(2) is satisfied. *See In re Wireless Facilities, Inc.*, 253
 15 F.R.D. 630, 635 (S.D. Cal. 2008) (finding "core issue" in a securities litigation to be plaintiffs'
 16 "acquisition of [defendant's] common stock at artificially inflated prices").

18 3. Typicality

19 The typicality requirement of Rule 23(a)(3) is satisfied when the claims or defenses of the
 20 party or parties representing the class are typical of the claims or defenses of the other class
 21 members. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (common-issues test
 22 readily met in securities cases). However, differences in the amount of damage, the size or
 23 manner of purchase, the nature of the purchaser, and the date of purchase are insufficient to
 24 defeat class certification. *See Alfus v. Pyramid Tech. Corp.*, 764 F. Supp. 598, 606 (N.D. Cal.
 25
 26

1991). In other words, typicality exists “even where factual distinctions exist between the claims of the named representative and the other class members.” *Danis v. USN Commc’ns, Inc.*, 189 F.R.D. 391, 395 (N.D. Ill. 1999). The typicality requirement recognizes that a class representative “with claims typical of the class will, in pursuing and defending his own self interest in the litigation, be concomitantly advancing or defending the interests of the class.” *Dubin v. Miller*, 132 F.R.D. 269, 274 (D. Colo. 1990) (citing 1 Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 3.22, at 199 (2d ed. 1985)).

Here, Lead Plaintiff’s claims and the claims of members of the Class arise from the same alleged conduct by Defendants. Lead Plaintiff alleges that, like the other members of the Class, he purchased and/or acquired Isilon common stock at prices that were inflated because Defendants, in violation of the federal securities laws, issued false and materially misleading statements and/or omissions during the Class Period. The proof(s) that Lead Plaintiff would present to establish his claims would also prove the claims of the rest of the Class. *In re Intelcom Group Sec. Litig.*, 169 F.R.D. 142, 149 (D. Colo. 1996) (finding typicality in securities class action where major issue presented was “whether the Defendants have violated the federal securities laws”). Further, Lead Plaintiff is not subject to any unique defenses that could make him an atypical member of the Class. Therefore, Lead Plaintiff respectfully submits that the Court should find that his claims are typical of the claims of the Class.

4. Adequacy

A representative party satisfies Rule 23(a)’s adequacy requirement by showing that it will fairly and adequately protect the interests of the class. To satisfy this requirement, the proposed class representative must be free of interests that are antagonistic to the other members of the class, and counsel representing the class must be qualified, experienced and capable of

conducting the litigation. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (citation omitted); *Hanlon*, 150 F.3d at 1020.

Here, as described above, Lead Plaintiff has claims that are typical of and coextensive with those of the Class. Lead Plaintiff, like all Class Members purchased or otherwise acquired Isilon common stock at artificially inflated prices during the Class Period as a result of the Defendants' alleged materially false and misleading statements and/or omissions, and was allegedly damaged thereby. Further, Lead Plaintiff has retained counsel highly experienced in securities class action litigation, who has successfully prosecuted many securities and other complex class actions throughout the United States. Thus, Lead Plaintiff is an adequate representative of the proposed Class, and its counsel is qualified, experienced and capable of prosecuting this action, in satisfaction of Rule 23(a)(4).

5. Common Questions of Law Predominate and a Class Action is the Superior Method of Adjudication

Finally, in addition to the four requirements of Rule 23(a), a class must also satisfy one of the three subparts of Rule 23(b). Here, little question exists that a class action is superior to other available methods for litigation of the claims asserted here, as required by Rule 23(b)(3). To ensure that the class action is more efficient than individual actions, Rule 23(b) requires that common issues predominate over issues that are particular to a class representative. Generally, common questions will predominate if the common issue constitutes a significant part of each of the class members' individual cases. "[C]ommon issues need only predominate, not outnumber individual issues." *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 374-75 (N.D. Ohio 2001). Further, "the superiority of class actions in large securities fraud [matters] is well recognized." *Intelcom*, 169 F.R.D. at 149.

The predominance test is met in this Action: the same set of operative facts and a single proximate cause applies to each Class Member. Further, the fact that a class action is the superior method to efficiently and effectively pursue the claims alleged here is shown by the fact that if Lead Plaintiff and each of the Class Members were to bring individual actions, they each would be required to prove the same wrongdoing by Defendants to establish liability. *See Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) (class actions are a particularly appropriate and desirable means to resolve claims based on securities laws).

In light of the foregoing, all of the requirements of Rule 23(a) and (b) are satisfied. Thus, there are no issues that prevent the Court from certifying the proposed Class for settlement purposes and appointing Lead Plaintiff as the class representative.

IV. PROPOSED SCHEDULE

If the Court grants preliminary approval to the proposed Settlement, the Parties respectfully submit the following procedural schedule for the Court's review:

Event	Time for Compliance
Date by which the Claims Administrator shall cause a copy of the Notice and the Proof of Claim to be mailed by first class mail to all Class Members who can be identified with reasonable effort (the "Notice Date")	30 calendar days after the Court's entry of the Order for Notice and Hearing
Deadline for publishing Summary Notice in <i>The Investor's Business Daily</i>	10 calendar days after the Notice Date (Order for Notice and Hearing, ¶16)
Deadline for Filing Proofs of Claim	150 calendar days following the Notice Date (Order for Notice and Hearing, ¶20)

Filing of memoranda in support of approval of the Settlement and Plan of Allocation and in support of Plaintiffs' Counsel's application for an award of attorneys' fees and reimbursement of expenses	21 days before the Settlement Fairness Hearing (Order for Notice and Hearing, ¶24)
Deadline for filing Exclusion Requests or Objections; both to be received by the Claims Administrator and Lead Counsel by this date	Not later than 14 calendar days before the Settlement Fairness Hearing (Order for Notice and Hearing, ¶¶ 18, 19)
Filing of memoranda in response to any objections to the Settlement	7 days before the Settlement Fairness Hearing (Order for Notice and Hearing, ¶ 25)
Settlement Fairness Hearing	Approximately 120 days following execution of the Order for Notice and Hearing, or later at the Court's convenience (Order for Notice and Hearing, ¶10)

Certain of the events set forth above are tied to the date on which the Settlement Fairness Hearing will be held; Lead Plaintiff respectfully requests that it be scheduled for approximately 120 days after the entry of the proposed Order for Notice and Hearing. If this schedule is not convenient for the Court, Lead Counsel request that the Court use at least the same or greater intervals between each event listed in the proposed schedule to provide all Parties sufficient time to comply with the proposed Order for Notice and Hearing and to provide Class Members with sufficient time to review the terms of the Settlement, consider their options and act accordingly.

V. CONCLUSION

For all of the above reasons, Lead Plaintiff respectfully requests that his unopposed Motion for Preliminary Approval of Settlement be approved.

Dated: October 23, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following ECF participants:

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